

# **Fairer Scotland Duty – Summary**

# **Disclosure (Scotland) Bill**

**June 2019**

# FAIRER SCOTLAND DUTY – SUMMARY

## Disclosure (Scotland) Bill

<b>Title of Policy, Strategy, Programme etc</b>	Disclosure (Scotland) Bill
<b>Summary of aims and expected outcomes of strategy, proposal, programme or policy</b>	<p>The overall aim of the Bill is to ensure the disclosure regime meets the right balance between safeguarding and proportionality. Elements of the Bill also seek to deliver the Scottish Government's focus on transforming the lives of children and young people, opening doors of opportunity to all, making Scotland the best place to grow up and to give all our young children the best possible start in life.</p> <p>The Bill includes provision to</p> <ul style="list-style-type: none"> <li>• provide a different regime for childhood offending,</li> <li>• establish a mandatory PVG scheme with periodic renewals,</li> <li>• replace the concept of “regulated work” with “regulated roles” to make the scope of the Scheme easier to understand,</li> <li>• reduce the number of disclosure products,</li> <li>• introduce a review mechanism for the disclosure of police information,</li> <li>• create the ability for Disclosure Scotland to impose conditions on individuals under consideration for listing,</li> <li>• prescribe new powers for local authorities to make referrals to Disclosure Scotland,</li> <li>• introduce wider powers for Police Scotland to make referrals to Disclosure Scotland,</li> <li>• amend the offence lists and reduce disclosure periods for 8A and 8B offences on Level 2 disclosures, and</li> <li>• provide a simplified process for applications for the removal of convictions from Level 2 disclosures.</li> </ul> <p>These changes will be accompanied by a move to a digital-by-preference system and improved guidance supplied by Disclosure Scotland which will be developed in partnership with stakeholders.</p> <p>The Bill aims to make the disclosure regime simpler to understand for both disclosure subjects and organisations seeking disclosure. During early engagement work and the consultation it was observed that a large number of people found it difficult to navigate the varying products that Disclosure Scotland offer and even to tell which was the right one for them.</p>

In addition to reducing the number of disclosure products available, part of the simplification process will be achieved by introducing a mandatory membership for those who require to engage with the PVG Scheme. Many stakeholders were already under the impression that it was mandatory and that safeguarding could be enhanced by ensuring that all those performing qualifying work with vulnerable groups were members of the PVG Scheme. This will help to ensure that those that require to be members are easily identified and that we avoid drawing people into the scheme who do not require PVG membership.

The PVG Scheme will also move from a system of life long membership to time-limited membership. Lifetime membership has resulted in an inflated membership and individuals being unaware that there is a way to end their membership. Moving to a time-limited membership will mean that the size of the scheme becomes more proportionate, easier to manage and run. One of the central safeguarding aspects of the PVG Scheme is that all members are subject to on-going monitoring. Time-limited membership means that there will be a periodical renewal of membership which will encourage people to leave the PVG Scheme when they stop doing the role that qualifies them for the Scheme. They will then no longer be subject to indefinite monitoring which no longer provides a safeguarding benefit.

The Bill includes provision to end the automatic disclosure of convictions for offences accrued under the age of 18. Convictions accrued in this age range will not be disclosed without an initial assessment by Disclosure Scotland with the opportunity for an independent review and with regard given to representations from the subject of the disclosure. This will allow individuals to move on from childhood offending, improving the life chances for people who may have offending in their past but now live law-abiding lives. This new process will end automatic disclosure but ensure proper scrutiny of when such offending behaviour ought to be disclosed.

A reduction will be made to the amount of time that needs to pass before individuals can apply to have certain spent convictions removed from their Level 2 disclosure. This allows individuals to more quickly move on from offending behaviour, where it is no longer reflective of their current circumstances. The Bill will also simplify the process for applying to have a spent conviction removed. The existing process of making a summary application to a sheriff was seen as a significant barrier for people requesting removal both due to the cost and the complexity of the process.

The Bill will also see the introduction of a review process for the proposed disclosure of police information, also known as Other Relevant Information ("ORI"). Before ORI can be disclosed to a third party the individual will have the opportunity to ask the chief constable to review their decision to disclose ORI, be able to make

	<p>representations to the chief constable and have the opportunity to apply for independent review and make representations to the independent reviewer. This new process allows the individual to view ORI before disclosure to a third party, addressing concerns that the disclosure of such information is clouded in uncertainty and difficult to anticipate.</p>
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## **Summary of evidence**

We have been in ongoing consultation and engagement around Bill proposals since 2016. A public consultation was held between April and July 2018, with further engagement exercises across a variety of sectors throughout and since the public consultation. The consultation asked a question on whether any of the proposed options outlined would have an impact on any protected equality characteristic. Some of the issues raised are also relevant to the Fairer Scotland Duty.

The interactions between socio-economic disadvantage and the disclosure system are not well documented. However, as the disclosure regime generally is used to support staff recruitment and retention, it is possible to look at likely trends from publicly available statistics on income, anecdotal accounts from stakeholders and the experience of regulatory bodies which have made changes to their operational structure recently.

There is minimal impact caused by the disclosure regime for people within particular communities of place, for instance those living in rural parts of Scotland or living in deprived areas, as services are provided via paper, digital and telephone services. It is recognised that low income households are less likely to have home access to internet and digital services is discussed later on in this document.

### **Public consultation**

Potential socio-economic impacts were raised, primarily with regard to the mandatory scheme and with changes to the fee structure and a much more digital system.

A wide range of organisations, including religious bodies, local authorities and care providers, expressed concern that those in low paid positions may be negatively impacted by changes to the fee structure and a mandatory scheme.

It was highlighted by a local authority that the social care workforce, which would likely be pulled into a mandatory system, are recognised as a predominately low-paid workforce. This workforce are subject to membership of regulatory bodies which have a recurring membership, and there is anecdotal reporting of issues with meeting registration cost, particularly for part-time and sessional staff which has caused organisations to request regulatory bodies permit the spreading of registration cost through the year rather than making a lump payment.

### **Statistics**

#### **Time-limited membership with periodic renewal**

There is limited evidence on the impact of the disclosure regime on inequalities of outcome caused by socio-economic disadvantage.

With regard to the PVG Scheme, 69% of scheme members are women<sup>1</sup> and women are more likely to be employed in low income fields which fall under the definition of 'regulated work', such as certain social care roles. 97% of childcare and early years education workers are women and 98% of classroom assistants are women. Women also make up 76% of part time workers which can impact overall household income<sup>2</sup>.

Our engagement on policy proposals brought out concerns regarding the ability of those working in social care and similar regulated roles to pay a recurring fee for scheme membership. There is an intersection here where women make up the greatest proportion of the Scheme and are more likely to work in fields that would require scheme membership with a move to a mandatory scheme. Although average FTE earnings in the social care field are £18,500, the average hours worked across regulated and public services are 27.8 hours a week<sup>3</sup>. This means time-limited membership with periodic renewal is more likely to impact women. Officials continue to engage with stakeholders and explore sustainable financial models to avoid unduly burdening low paid workers who are required to be in the PVG Scheme as a result of their work.

### **Removal of convictions from disclosures**

Other proposals, specifically the provisions on disclosure periods and the barring service, will have a lower impact on women than men due to the lower rate of conviction for this group.

Research in Scotland has shown that most prisoners originate from areas of high socio-economic deprivation e.g. 62% of prisoners' addresses can be found in the 25% most deprived areas<sup>4</sup>. This also holds true with regard to youth offending, where young people from the most deprived areas have a higher risk of spending time in custody: the incarceration rate for under 21s was 4.5 per 1000 population for those from the 15% most deprived areas and 1.1 for those from all other areas<sup>5</sup>. Individuals who have committed serious offences in the past are more likely to be impacted by the use of the disclosure regime as these convictions will appear on Level 2 disclosures for a longer period.

Disclosure Scotland has contacted 364 individuals who had intimated an intention to apply to a sheriff for removal of a conviction 'disclosed subject to rules' on their Level 2 disclosure. Fifty-three responses were

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<sup>1</sup> Disclosure Scotland, System statistics (26 October 2018)

<sup>2</sup> Close The Gap, 'Occupational segregation', <https://www.closethegap.org.uk/content/gap-statistics/> (last accessed: 14 December 2018)

<sup>3</sup> Kearney J and White A (ICF Consulting Ltd), The Economic Value of the Adult Social Care sector – Scotland, Skills for Care and Development, 05 June 2018

<sup>4</sup> Scottish Prison Service, 'Organisational Review – Unlocking Potential, Transforming Lives', <http://www.sps.gov.uk/Corporate/Publications/Corporate9.aspx> (last accessed: 04 March 2019)

<sup>5</sup> Housing and Social Justice Directorate, 'The life chances of young people in Scotland: evidence review', <https://www.gov.scot/publications/life-chances-young-people-scotland-evidence-review-first-ministers-independent/pages/5/> (last accessed: 04 March 2019)

received, and of these, 13 cited cost of the application – legal representation and the court fee – as prohibitive to their pursuing their right to apply. One respondent stated they felt the process to be unfairly weighted against those who cannot afford legal help. Some respondents attempted to undertake the appeal process without a solicitor to reduce costs but found the process to be too complex. One respondent pursuing an appeal noted that continuing the appeal was contingent on their application for legal aid being accepted.

The proposal to allow an initial application to Disclosure Scotland for the removal of a spent conviction from a Level 2 disclosure seeks to reduce barriers to this right by offering an initial process which is simple to understand with a clearly set associated cost. This will be positive for those people with convictions from low income households or areas of material deprivation. There will also be recourse to appeal to the independent reviewer if the individual does not agree with the decision made as part of the internal appeal.

The Bill will include provision to end the automatic disclosure of convictions for offences accrued under the age of 18. Convictions in this range will not be disclosed without the opportunity for independent review and with regard given to representations submitted by the applicant. This recognises that adolescence is a unique phase of life and offending during childhood is not always indicative of a person's character as an adult. This is especially true for care experienced individuals, who are more likely to come into contact with the criminal justice system and end up with a criminal record. These proposals will allow people with offending in their past who now live law-abiding lives to move on.

As discussed in the Children's Rights and Wellbeing Impact Assessment and Equality Impact Assessment for the Disclosure (Scotland) Bill, the policies surrounding the disclosure of criminal information should have an overall positive impact on individuals with convictions and, in particular, individuals who have convictions from childhood.

### **Digital**

Regarding material deprivation, concerns were also raised regarding whether people without digital access would be left at a disadvantage compared to those with access under the proposals. The 2017 Scottish Household Survey indicates low income households are less likely to have home internet access<sup>6</sup>. In 2017, 66 per cent of households with incomes of £15,000 or less had home internet access, increasing to 99 per cent of households with incomes over £40,000. However, the gap in

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<sup>6</sup> Housing and Social Justice Directorate, 'Scottish household survey 2017: annual report', <https://www.gov.scot/publications/scotlands-people-annual-report-results-2017-scottish-household-survey/> (last accessed: 04 March 2019)

home internet access between low income brackets and the highest income bracket has decreased over the years. As part of its digital strategy, the Scottish Government has made the promotion of digital inclusion and accessibility one of its priorities.<sup>7</sup>

### Other evidence

Disclosure Scotland regularly engages with the Disclosure and Barring Service (DBS) for England and Wales and AccessNI for Northern Ireland to discuss approaches to disclosure. It should be noted that there is no equivalent to the PVG Scheme in these jurisdictions.

	Scotland	England & Wales	Northern Ireland
Basic	£25	£25	£26
Standard	£25	£26	£26
Enhanced	£25	£44	£33

Disclosure Scotland is continuing to investigate fee models and payment options which will balance the sustainability of all levels of disclosure under the proposals of the Bill while also remaining fair to the applicant, providing greater value and portability.

The Law Commission report on Criminal Records Disclosure in England and Wales looked at the process of ‘filtering’ (removing convictions from a record) and considered disclosure systems in several European countries, including Scotland, Northern Ireland, France, the Netherlands, Germany, Spain and Sweden<sup>8</sup>. Most of the countries discussed had some form of rehabilitation period that results in automatic removal of some convictions from a record. Spain, Germany, France and Northern Ireland all allow for some sort of judicial, governmental or independent review to remove convictions which are not automatically removed from a record. The Scottish Government’s 2015<sup>9</sup> and 2018<sup>10</sup> Remedial Orders ensured there was a recourse for any conviction to be reviewed and potentially removed from a record once certain conditions are met. The proposals in this Bill further strengthen an individual’s right and ability to have their vetting information reviewed.

<sup>7</sup> Digital Directorate, ‘Realising Scotland’s full potential in a digital world: a digital strategy for Scotland’, <https://www.gov.scot/publications/realising-scotlands-full-potential-digital-world-digital-strategy-scotland/> (last accessed: 04 March 2019)

<sup>8</sup> Law Commission, ‘Criminal Records Disclosure’, <https://www.lawcom.gov.uk/project/criminal-records-disclosure/> (last accessed: 04 March 2019)

<sup>9</sup> The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial (No. 2) Order 2015, 2015 No. 423

<sup>10</sup> The Police Act 1997 and the Protection of Vulnerable Groups (Scotland) Act 2007 Remedial Order 2018, 2018 No. 52



## Summary of assessment findings

### Digital system

Responses to the consultation were generally favourable to a move towards a digital by preference system with stakeholders highlighting the potential for quicker, more efficient and secure processing. However, many respondents also commented on the need to ensure the disclosure system remain accessible to those unable to use a digital system. Disclosure Scotland is committed to doing so and will explore with users the best way to do this.

The proposal is the system will be digital-by-preference, not digital-only, and an accessible offline option will thus be retained. This also reflects a need in the Equality Impact Assessment.

Disclosure Scotland has been carrying out user research as part of its existing digital transformation programme. This user research will continue to ensure the digital system itself is user-friendly.

### Mandatory scheme and fees

Disclosure Scotland is continuing to review fee structure and payment options, including the feasibility of payment of Level 2 with PVG membership in instalments, which would allow low income individuals to stagger costs over their membership period. Disclosure Scotland is looking at options in a digital system to allow people accessing Level 1 disclosures to benefit from cheaper subsequent disclosure by creating an online account with Disclosure Scotland. Both of these proposals attempt to minimise the financial impact that the disclosure system can have on individuals employed within low paid sectors and those that may need to engage with the disclosure system regularly within short periods of time. Engagement with stakeholders via the consultation and other channels has seen the financial impact of the disclosure system with mentioned by several organisations especially those involved in the care sector and by third sector organisations.

### Removal of convictions from disclosure

The current system requires an individual to apply to a sheriff to have spent convictions removed. This court process, which includes legal representations, results in many individuals not starting off completing the application process due to expense and/or complexity. The majority of respondents to the consultation who answered this question stated that the existing sheriff process should be reviewed. On the question of what the alternative to the application to the sheriff should be, the majority of respondents to this question supported the options of an internal application to Disclosure Scotland and application to the independent reviewer.

	<p>The new simplified process, which involves Disclosure Scotland making the initial decision on whether a conviction should be disclosed strips out financial and technical barriers and should improve outcomes for those from low economic backgrounds. Applicants will have a right of recourse to the independent reviewer if they are not satisfied with Disclosure Scotland's decision following the internal review.</p>
<b>Decision</b>	<p>This Bill is designed to help create a fairer and more proportionate disclosure regime and should impact positively on the experience of many of those at a socio-economic disadvantage.</p> <p>The Bill will ensure we continue to strike a balance between the twin objectives of delivering a fairer, less invasive, disclosure system whilst also strengthening its ability to protect the most vulnerable in society. It will support the modernisation of the disclosure regime in Scotland so that it is more responsive to the needs of stakeholders.</p> <p>Officials will continue to engage with stakeholders on transitional arrangements and as the Bill moves forward to ensure concerns are captured and considered.</p>
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Any enquiries regarding this publication should be sent to us at  
The Scottish Government  
St Andrew's House  
Edinburgh  
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ISBN: 978-1-78781-913-9 (web only)

Published by The Scottish Government, June 2019

Produced for The Scottish Government by APS Group Scotland, 21 Tennant Street, Edinburgh EH6 5NA  
PPDAS590310 (06/19)